Office-Supreme Court, U.S.
FILED
APR 14 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1557

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

I/S NOREXIM, and M/V TENTO,
Petitioners,

vs.

GULF TRADING & TRANSPORTATION Co., and
PERMAL SHIPPING Co.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Ninth Circuit

ERIC DANOFF
GRAHAM & JAMES
One Maritime Plaza,
Suite 300
San Francisco, CA 94111
Telephone: (415) 954-0200
Attorneys for Respondents Gulf Trading & Transportation Co., and Permal Shipping Co.

ROBERT J. ZAPF
JOHN G. INGRAM
BURLINGHAM, UNDERWOOD & LORD
One Battery Park Plaza
New York, N. Y. 10004
Of Counsel

BOWNE OF SAN FRANCISCO, INC. • 180 NINTH ST. • S.F., CA 94103 • (415) 864-2500

QUESTIONS PRESENTED

Respondents submit that the issues Petitioners raise are more accurately stated by the following questions:

1. Was it proper for the Court of Appeals to apply the modern contact analysis test announced by the Supreme Court in *Lauritzen v. Larsen* and by the Court of Appeals for the Second Circuit in *Rainbow Line, Inc. v. M/V Tequila* for choice of law to determine the validity of a maritime lien claim against a vessel for supplies or services, or should the Court of Appeals have applied a single factor approach that the law of the place of supply governs?

2. If the choice of law test applicable to a maritime lien claim is the modern contact analysis approach, should the Supreme Court review the decisions of the District Court and the Court of Appeals in this case that United States law applied to impose a lien on a Norwegian flag vessel for bunkers supplied pursuant to an agreement made in the U.S. between two U.S. parties, although delivery of those bunkers was in Italy, and for canal expenses supplied pursuant to an agreement made in the U.S. between two U.S. parties, although the canal expenses were advanced in Egypt, where by consent of the owner the vessel's base of operations at the relevant times was in the United States?

3. Should the Supreme Court review the conclusion of the Court of Appeals that its holding was consistent with congressional policy stated in the legislative history of the 1971 amendment to 46 U.S.C. § 973?

4. Is the decision by the Ninth Circuit Court of Appeals in this case inconsistent with the decision of the Fifth Circuit Court of Appeals in *Gulf Trading & Transportation*

Co. v. The Vessel Hoegh Shield (5th Cir. 1981) 658 F.2d 363, where both courts applied the modern contact analysis approach enunciated by the Supreme Court in *Lauritzen v. Larsen* and by the Second Circuit in *Rainbow Line, Inc. v. M/V Tequila*?

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement of Facts	1
The Gulf Transaction	2
The Permal Transaction	3
Proceedings Below	3
I	
The Court of Appeals Applied the Settled and Proper Test for Choice of Law to Determine the Validity of a Maritime Lien Claim Against a Vessel for Supplies or Services	4
II	
The Court of Appeals Properly Applied the Choice of Law Rules to the Facts in this Case	9
III	
The Holding of the Court of Appeals Is Consistent With Congressional Policy	11
IV	
The Decision of the Ninth Circuit in This Case Is Consistent With the Decision By the Fifth Circuit in Gulf Trading & Transportation Co. v. The Vessel Hoegh Shield	12
Conclusion	14

TABLE OF AUTHORITIES

Cases

Page

Gulf Trading & Transportation Co. v. The Vessel Hoegh Shield (5th Cir. 1981) 658 F.2d 363, cert. den. (1982) 73 L.Ed. 2d 1332, 102 S.Ct. 2932 ..... i, 5, 12, 13

Hellenic Lines, Ltd. v. Rhoditis (1970) 398 U.S. 306, 26 L.Ed. 2d 252, 90 S.Ct. 1731 ..... 5, 9, 10

Lauritzen v. Larsen (1953) 345 U.S. 571, 97 L.Ed. 1254, 73 S.Ct. 921 ..... 4, 5, 7, 8, 9, 12

Mobil v. Pacific Bear (N.D. Cal. 1979) 1980 A.M.C. 1409 5

Phillips v. Amoco Trinidad Oil Co. (9th Cir. 1980) 632 F.2d 82, cert. den. (1981) 451 U.S. 920, 101 S.Ct. 1999, 68 L.Ed. 2d 312 10

Rainbow Line, Inc. v. M/V Tequila (2d Cir. 1973) 480 F.2d 1024, 1026 ..... 5, 8, 12

Romero v. International Terminal Operating Co. (1959) 358 U.S. 354, 382, 3 L.Ed. 2d 368, 79 S.Ct. 468 ..... 4, 5, 7

The Scotia, (S.D.N.Y. 1888) 35 Fed. 907 8

Statutes

46 U.S.C.:

§ 971 13

§ 973 ..... i, 11

Miscellaneous

Restatement (Second):

§ 251(1) 6

§ 251(2) 5, 6, 7

Comment e to § 251 7

House Committee Report No. 92-340, 1971 U.S. Code Cong. and Admin. News, p. 1365 11

No. 82-1557

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

I/S NOREXIM, and M/V TENTO,
Petitioners,

vs.

GULF TRADING & TRANSPORTATION CO., and
PERMAL SHIPPING CO.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Ninth Circuit

STATEMENT OF FACTS

Respondents Gulf Trading & Transportation Company (Gulf) and Permal Shipping Company (Permal) brought separate *in rem* actions in the District Court against the vessel *Tento*. Petitioner I/S Norexim (Norexim) was not a named defendant but appeared as claimant of the vessel and defended the actions on the vessel's behalf.

The *Tento* is a Norwegian flag vessel owned by Norexim, a Norwegian corporation. Norexim placed the *Tento* under time charter to Aspen Steamship Company (Aspen), and Aspen subchartered the vessel to Coin, S.A. (Coin). Both Aspen and Coin operated from New York City. Norexim's charter to Aspen provided that United States

law would govern certain aspects of the agreement and that the charterer was responsible for providing fuel to the *Tento* and canal tolls. The charter party between Aspen and Coin placed similar obligations upon Coin. Both charter parties were "made and concluded" in New York City. Charter hire was to be paid to Norexim's bank account in New York. Arbitration of disputes under the charter parties was to be held in New York. While the *Tento* was under charter to Coin, the ship's Master took his operating and sailing directions from Coin's agent in New York. Before being chartered to Coin, the *Tento* had just called at Providence (Rhode Island), Bridgeport (Connecticut), and Baltimore (Maryland). Thereafter, following the charter to Coin, the ship next went to Philadelphia, Savannah (Georgia), New York, Providence, and Boston.

While the *Tento* was at sea en route from Boston to Taranto, Italy, the ship's Master sent a request to Coin's agent in New York for additional bunkers, which the Master expected to be delivered in Port Said, Egypt. However, the *Tento's* discharge of cargo in Taranto was greatly delayed, to the point that the ship was so low on diesel oil that it could not leave the berth. The Master sent several urgent requests to New York for bunkers to be supplied at Taranto rather than in Egypt.

The Gulf Transaction

Coin's New York agent asked a fuel broker in New York City to order fuel for the *Tento* to be supplied in Italy. The broker contacted Gulf at its New York sales office and made an oral contract with Gulf in New York for sale and delivery of the bunkers.

Gulf, a U.S. corporation, used an Italian company, AGIP, to deliver the fuel to the *Tento* in Italy. Gulf paid AGIP and charged the *Tento* $105,447.46. The invoice remains unpaid.

The Permal Transaction

Permal, which operates from New York City, is a division of a New York corporation, Permal International, Inc. Coin's New York agent asked Permal in New York to advance payment in Egypt of expenses to be incurred in connection with the Suez Canal transit of the *Tento*. Permal arranged for payment of $41,131.74 for tolls, canal dues, tug hire, berthing, port and light dues, and pilotage, and $317.51 for the expenses of two crew members. Permal claims a maritime lien for the unpaid balance, $12,376.91.

Proceedings Below.

Gulf and Permal initiated *in rem* actions against the *Tento* by arresting the vessel in Stockton, California. The charters having terminated, Norexim was operating the vessel. The vessel posted security and Norexim appeared to defend the actions against the vessel. Gulf asserted a maritime lien for the fuel oil, and Permal asserted a maritime lien for the canal expenses.

In the United States District Court for the Northern District of California and in the Ninth Circuit Court of Appeals, Norexim contended that Italian law (which referred to Norwegian law) governed the Gulf transaction and that Egyptian law governed the Permal transaction, and that under those laws the *Tento* was not subject to a maritime lien for fuel or canal expenses. Norexim argued that Italian and Egyptian law controlled because choice

of law in a maritime lien case should be determined by a single point of contact: the country where the supplies were delivered. In the alternative, Norexim argued that even if the choice of law were made by weighing all the points of contact in each transaction, Italian law should rule the Gulf transaction and Egyptian law should rule the Permal transaction. Rejecting Norexim's arguments, the District Court determined that United States law applies to each transaction, and that under U.S. law the claimed liens were valid, and so gave judgment against the *Tento* in favor of Gulf in the amount of $105,447.46 and in favor of Permal in the amount of $12,376.91. The Ninth Circuit Court of Appeals affirmed. 694 F.2d 1191.

I

THE COURT OF APPEALS APPLIED THE SETTLED AND PROPER TEST FOR CHOICE OF LAW TO DETERMINE THE VALIDITY OF A MARITIME LIEN CLAIM AGAINST A VESSEL FOR SUPPLIES OR SERVICES

Petitioner argues that the modern choice of law principles announced in *Lauritzen v. Larsen* (1953) 345 U.S. 571, 97 L.Ed. 1254, 73 S.Ct. 921 should be restricted to tort cases involving injuries to foreign seamen. The law is settled to the contrary. The Supreme Court has clearly stated that a U.S. court should resolve all maritime choice of law questions by ascertaining and evaluating points of contact between the transaction in issue and the countries whose competing laws are involved. While *Lauritzen v. Larsen, supra,* concerned a Jones Act claim for maritime personal injury, the Supreme Court in *Romero v. International Terminal Operating Co.* (1959) 358 U.S. 354, 382,

3 L.Ed. 2d 368, 79 S.Ct. 468 held that the choice of law principles set forth in *Lauritzen* are to govern choice of law problems in all maritime cases, with due regard for the differing interests of the relevant aspects of maritime law, and for the interacting interests of the United States and the foreign countries involved. *Romero, supra,* 358 U.S. at 382-3. These choice of law principles have been consistently applied when courts have decided whether U.S. law should determine the validity of a claimed maritime lien on a vessel. See, e.g., *Rainbow Line, Inc. v. M/V Tequila* (2d Cir. 1973) 480 F.2d 1024, 1026-7; *Gulf Trading & Transportation Co. v. The Vessel Hoegh Shield* (5th Cir. 1981) 658 F.2d 363, cert. den. (1982) 102 S.Ct. 2932; *Mobil v. Pacific Bear* (N.D. Cal. 1979) 1980 A.M.C. 1409. The *Romero* decision also rejected the use of any fixed or single factor rule of conflicts law. 358 U.S. at 383. Amplifying *Romero* was *Hellenic Lines, Ltd. v. Rhoditis* (1970) 398 U.S. 306, 26 L.Ed. 2d 252, 90 S.Ct. 1731, which confirmed the *Lauritzen* approach and added that the contacts considered in the *Lauritzen* case are neither exhaustive nor necessarily entitled to equal weight in a given context. 398 U.S. at 309.

The Court of Appeals in this case applied the *Lauritzen* test in determining choice of law. Petitioner's argument that *Lauritzen* and its progeny are limited to seamen's personal injury actions is clearly at odds with precedent, including that of the Supreme Court.

Petitioner therefore also argues that while *Lauritzen* is "consistent with the broad choice of law principles" of the Restatement (Second) of Conflict of Laws, § 251(2) of the Restatement requires that overriding importance be given

to the location of the vessel when the supplies are delivered. This is an incorrect interpretation of the Restatement, and is in effect to urge the application of the obsolete "single factor" approach under the guise of the Restatement. Section 251(2) has never been so interpreted or used by any court. The Court of Appeals considered this argument and found that the location of the vessel in this particular case was "happenstance and insubstantial" compared to other factors in these transactions. The Court of Appeals correctly decided that on the facts of this case Restatement § 251(2) did not compel the kind of single factor approach that the *Lauritzen* rule was promulgated to avoid. The *Lauritzen* rule does not and should not require slavish adherence in maritime cases to the Restatement, let alone to any particular section of the Restatement.

The Restatement approach in deciding what law to apply to determine the validity and effect of a security interest in a chattel is, in any event, the same modern approach of evaluating contacts and interests as is required by the *Lauritzen* rule. Restatement (Second) § 251(1) states:

> "The validity and effect of a security interest in a chattel as between the immediate parties are determined by the local law of the state which, with respect to the particular issue, has the *most significant relationship* to the parties, the chattel and the security interest under the principles stated in § 6. (Emphasis added.)

Comment e to this section directs the court's attention to the relevant policies of all potentially interested states and the relative interests of those states. These are criteria

similar to those set forth in *Lauritzen* and followed by the Court of Appeals.

Section 251(2) only makes sense when applied to an immoveable chattel, not to a vessel in international commerce. This is recognized by Comment e to § 251, which states:

> "The situation is different when it is understood that the chattel will be kept only temporarily in the state where it was located at the time the security interest attached. Here it is more likely that, with respect to the particular issue, some other state will have the most significant relationship to the parties, the chattel and the security interest and be the state of the applicable law."

The Court of Appeals correctly applied the *Lauritzen* choice of law approach. The Court of Appeals considered the location of the *Tento* where the bunkers and canal tolls were provided, but determined that other factors and interests were more significant. Restatement § 251(2) does not and should not override this approach.

Petitioner suggests that historically (that is, before *Lauritzen*) U.S. courts looked to the law of the place where the vessel was located as the most significant factor in determining maritime lien rights. There are a few early district court cases, all from the 1920's or before, in which the courts indicated that the question whether vessel suppliers had a maritime lien was to be determined by the law of the place where the supplies were provided. (Petitioner has cited these cases on p. 8, fn. 6.) These old cases are without precedential value insofar as they contradict *Lauritzen* and *Romero*. In these earlier cases the contracts for ob-

taining the supplies generally were made in the same place where the supplies were provided, and the authorities upon which these earlier cases rely hold that the place of the "transaction" rather than the place of "supply" is the controlling consideration. See *The Scotia* (S.D.N.Y. 1888) 35 Fed. 907, in which the court stated that the law of the place of supply is to be applied where the contract is both *made and performed* entirely within the jurisdiction where the supplies are furnished. (35 Fed. at pp. 909-910.) Similarly, in *Rainbow Line, Inc .v. M/V Tequila* (2d Cir. 1973) 480 F.2d 1024, 1026, footnote 5, the court stated that there is authority for the proposition that a lien for supplies furnished to the vessel should be determined by the law of the place of the "transaction", not necessarily the place of supply. Of course, in the 1920's and before—that is, before the advent of world-wide communication systems—supplies were generally ordered where they were obtained, so the courts had little reason to distinguish between the place of contract and place of supply; the two were nearly always the same. Now however the contract for supplies can, as in these transactions, be made thousands of miles from the place of delivery. Thus it is appropriate for a court to apply modern choice of law rules and consider all the contacts and interests involved in the transaction, not merely the place of supply.

The Court of Appeals applied the correct choice of law rules. There is no basis for concluding that the *Lauritzen* rule should not be applied to maritime lien cases or that the *Lauritzen* rule adopts a single factor "place of supply" approach in maritime lien cases.

II

THE COURT OF APPEALS PROPERLY APPLIED THE CHOICE OF LAW RULES TO THE FACTS IN THIS CASE

Petitioner argues that the Court of Appeals misapplied the rules of *Lauritzen* and *Rhoditis*. Weighing contacts and interests must, of course, be done on a case by case basis, and courts must be allowed some discretion in this task. It is hardly appropriate to complain to the Supreme Court that the Court of Appeals somewhat underweighed or somewhat overweighed a particular factor. All choice of law decisions would be subject to Supreme Court review under that standard.

Petitioner argues that the Court of Appeals erred by finding that the base of operations of the shipowner was in the United States. Not so. The Court of Appeals correctly held that the *vessel's* base of business operations is also relevant. Here, the owner had contractually agreed to charter its vessel to companies based in New York, which controlled the vessel's movement from there. The injured parties were U.S. companies approached by other U.S. companies in New York, the supply agreements were made in New York, the shipowner's charter party was by its terms governed by U.S. law for several purposes, and the *Tento* had significant trade at U.S. ports. Perhaps of most significance, the Court of Appeals found that Italy and Egypt had no interest in having their law apply here, particularly because none of their nationals were injured. Petitioner does not substantially address these findings. Instead Petitioner focuses on the Court of Appeals' statement that the base of operations of the relevant business venture was in the U.S., a statement made in

a footnote (694 F.2d at 1196, fn. 7) in response to Petitioner's argument that the shipowner's base of operations was Norway. To ask the Supreme Court to review that statement is to isolate and overly emphasize a single factor in a multi-factor choice of law decision.

The Court of Appeals did not find that the *shipowner's* base of operations was in the U.S. Rather, the Court of Appeals found that the base of operation of the *relevant business venture* was in the U.S. That finding is clearly appropriate in this case. The shipowner's base of operations was relevant in *Rhoditis* because the shipowner was the defendant and allegedly was personally liable for the seaman's injury. In this case the action is not against the shipowner but against the vessel, and it is the vessel's, not the shipowner's, base of operations that is relevant here. The *Tento* was in fact operated out of New York insofar as events relevant to the issues in dispute in this case. The charterer in New York was responsible for providing bunkers and canal expenses to the vessel, and did so from New York. The Court of Appeals decision therefore is consistent with its decision in *Phillips v. Amoco Trinidad Oil Co.* (9th Cir. 1980) 632 F.2d 82, cert. den. (1981) 451 U.S. 920, 101 S.Ct. 1999, 68 L.Ed.2d 312, which also focused on the base of operations of the relevant business venture rather than of the corporate owner of the vessel. Regardless, any such conflict would be better left to the Ninth Circuit to resolve.

The weighing of contacts and interests in a choice of law analysis necessarily requires some judicial discretion. Petitioner raises no questions about the analysis by the Court of Appeals in this case that is worthy of review by the Supreme Court.

III

THE HOLDING OF THE COURT OF APPEALS IS CONSISTENT WITH CONGRESSIONAL POLICY

The Court of Appeals noted that its holding was consistent with congressional policy, quoting (694 F.2d at 1194) the following from the legislative history to the amendment of the Maritime Lien Act, 46 U.S.C. § 973:

> "Your Committee gave careful consideration to this problem of American materialmen where the owner, by chartering or surrendering possession of the vessel, clothes the master thereof with at least apparent authority to bind the vessel for necessaries furnished to the vessel. The question presented was where a loss occurs in this situation, whether it should be suffered by the owner of the vessel, *or the American materialman who furnished such necessaries in good faith.*
>
> • • •
>
> "After careful consideration of the entire record, your Committee has concluded that, as a matter of equity, the owner should bear the loss in such a situation.
>
> "As a practical matter, the owner can more easily protect himself contractually by bonds or otherwise at the time he charters the vessel, than can the American materialman who furnishes necessaries to a vessel under great economic pressure to put back to sea. (House Committee Report No. 92-340, 1971 U.S. Code Cong. and Admin. News, p. 1365.) (Emphasis added.)

Petitioner argues that this legislative history is not relevant. Indeed it is. Congress intended to protect American suppliers of necessaries. This statement of legislative policy is not restricted to foreign flag vessels that are provided supplies in U.S. ports. The Court of Appeals was certainly correct in stating that its decision comported with this stated policy.

The Court of Appeals did not base its decision on the legislative history. The Court of Appeals based its decision on an analysis of the relevant contacts and interests involved in these transactions. Therefore, this dictum about the legislative history, while correct, would not be an appropriate basis for Supreme Court review in any event.

Nor did the decision of the Court of Appeals "unduly emphasize American interests", as Petitioner contends. The Court of Appeals was specifically mindful of "the desirability, even the necessity, of accommodating the legitimate interests of separate sovereignties in vindicating their own legal policies" (694 F.2d at 1194), and "the interests of competing sovereigns". (694 F.2d 1195.) Simply put, neither Italy nor Egypt has any interest in this case, or in having their law apply to this case. U.S. interests, on the other hand, are obvious and significant.

IV

THE DECISION OF THE NINTH CIRCUIT IN THIS CASE IS CONSISTENT WITH THE DECISION BY THE FIFTH CIRCUIT IN GULF TRADING & TRANSPORTATION CO v. THE VESSEL HOEGH SHIELD

The decision by the Ninth Circuit in this case is consistent with that by the Fifth Circuit in *Gulf Trading and Transportation Co. v. The Vessel Hoegh Shield* (5th Cir. 1981) 658 F.2d 363, cert. den. (1982) 102 S.Ct. 2932. Both cases determined choice of law governing the validity of maritime liens by applying the modern choice of law rules set forth by the Supreme Court in *Lauritzen* and subsequent cases and by the Second Circuit in *Rainbow Line, Inc. v. M/V Tequila.* In the *Tento* case, the relevant contacts and interests call for the application of American

law. In the *Hoegh Shield* case, the relevant contacts and interests also called for the application of American law, albeit for different reasons. In each case an American supplier asserted a maritime lien against a vessel resulting from a transaction with a dominant locus in the U.S. This is not to say that U.S. law would always apply to maritime lien issues, and neither Court of Appeals so held or stated.

The two cases are consistent on the issues that Petitioner addresses. First, in the *Hoegh Shield* case the place of contracting was not ignored. On the contrary, it was given significant attention. (See 658 F.2d at 366-7.) But in that case it was "only half of the story". (658 F.2d at 367.) The other half of the story was that the bunkers were supplied by an American supplier in a U.S. port. Therefore the U.S. had an interest in the application of its law to the transaction, an interest that outweighed the interest of Great Britain in having its law apply to the case. In both the *Hoegh Shield* and in the *Tento* cases, therefore, the U.S. had an important interest in applying U.S. law, while the relevant foreign countries had little or no interest in having their law apply. That the U.S. interests are based on *different* factors in each case does not make them *inconsistent.*

Second, as described above, the Ninth Circuit did not rely on the *shipowner's* base of operations, but rather on the fact that the relevant part of the business venture's base of operations was in the U.S. That factor was not important in the *Hoegh Shield* case, and the Fifth Circuit never addressed it. Thus there is no inconsistency with the Ninth Circuit's decision in this case.

Third, while the Fifth Circuit found that 46 U.S.C. § 971 was intended to protect American suppliers in U.S.

ports, the Fifth Circuit never stated that U.S. lien law was to be *restricted* to cases of supply by American suppliers in U.S. ports. The court did not need to reach that question, and so never discussed it. The Fifth Circuit finding on this point is thus not inconsistent with the Ninth Circuit's.

Since the two decisions are essentially consistent in their approach to choice of law in maritime lien cases, there is no significant conflict between the Circuits for the Supreme Court to resolve.

CONCLUSION

Respondents respectfully submit that the Supreme Court should not grant a Writ of Certiorari to review the decision of the Court of Appeals in this case. As the Court of Appeals stated: "It is not . . . inequitable to require shipowners whose charterers make orders on a multinational level to know the law of the nation in which their charters have extensive contacts." 694 F.2d at 1195.

Respectfully submitted,
GRAHAM & JAMES

By ERIC DANOFF
Attorneys for Respondents
Gulf Trading & Transportation Co., and
Permal Shipping Co.

BURLINGHAM, UNDERWOOD & LORD
ROBERT J. ZAPF
JOHN G. INGRAM
Of Counsel

[THIS PAGE INTENTIONALLY LEFT BLANK]